it is all of the things that contribute to it. As we move forward, it is the hard-working Americans who participate in this economy whom we have to consider.

The pathway to saving the planet will require that we partner with the business community and empower them to transition from an old energy economy and energy technologies dating back centuries, to the emerging energy economy and the emerging energy technologies needed for a new, cleaner economy and a new, cleaner environment. Failure to do so could lead to the loss of jobs in communities all across our Nation.

But it could also lead to a failed environmental policy because the fact is, if we do not get this right now, we could spend the next 2 or 3 years dealing with legislation that might not work, is not going to have all of the intricacies and all of the matters dealt with that need to be dealt with. And 3 years down the road, what happens? We repeal it? We have wasted 3 precious years, 3 or 4 precious years, where we could have been working productively to reach the goal of strengthening our economy and preserving our environment.

Another concern is the unintended hardships the bill might place on the elderly and working families, particularly in my State. I am sure other Senators have those same concerns.

In a State with a median income level of $37,420, ranking Arkansas 48th among all States, many of my constituents live paycheck to paycheck absolutely every week. I am rightfully concerned about a bill that could drive up utility rates, with the costs being passed on to consumers. And for my constituents, even a $15-per-month increase in their energy bills would be devastating. Now, for some of us, $15 we will notice, but it might not make a difference between whether we are going to sign our kids up for Little League or whether we are going to be able to help our grandparents or our parents with their prescription drugs or even put food on the table. But for some hard-working Americans, those kinds of increases could mean an awful lot. That is why it is all the more important that we get this bill right.

I want to support climate change legislation. That is something I feel very passionate about. I want to because I believe it is ultimately our responsibility to preserve and protect our planet for future generations. I truly believe we can no longer afford to put our heads in the sand about this issue. We have to move forward. We have to express the importance and the urgency of this issue. But I also echo that it is critically important we get it right. That is why I say the devil is in the details.

As we move forward in these discussions on what we are doing, we have to pay critical attention to the details of this bill. It is why we cannot afford to have, as I said, our heads in the clouds about the realities of the issues that are associated without fully understanding the impact of this bill as we have looked at it today, as currently written, on industry and working families of this country.

I dedicate myself to making sure not only that we passionately look at this issue for all the right reasons of preserving our environment but that we also equally as passionately look at this bill to make sure the mechanisms that partner us with the economy and the engines of economy we get right.

I am committed to working closely with the sponsors of the legislation as well as the industries in my State and all across this Nation. We have an obligation, an obligation and a responsibility not only to protect this environment but also to protect the incredible working families whom we represent, the hard-fought jobs they work in day-in and day-out to care for their families, and the good corporate citizens that are trying their best to make sure those jobs stay in this country.

I believe we can craft a proposal that will appropriately balance the needs of business and consumers, especially those most vulnerable to an increase in energy costs or a shift in our culture of energy, to protect our environment for our children and our grandchildren but also to keep that balance in recognition with how important that impact is on our communities across our States and across this great country.

I do so appreciate all of the hard work, the enormous effort so many Senators have put into this bill. Senator LIEBERMAN and Senator WARNER and, of course, Chairman BOXER have all invested a tremendous amount of time in this bill. As we continue to move forward in looking at this issue, in looking for solutions, I hope that in their leadership they will embrace all of the Senators who have great ideas in terms of how we can move forward in making this a success, in preserving our environment but ensuring that the working people of this country and the hard-fought industries that are here providing the jobs we want to see stay in this great country, that they are going to have a seat at the table and come up with a bill that will benefit everybody.

While I still have some questions about what we are dealing with and the debate we had and will continue to have, I want to keep my door open. I want to work with my colleagues to address the real and the long-term issues of climate change in the weeks and months ahead. But I also want to make sure our focus does not lose sight of the other consequences that come from this bill.

I appreciate the debate we have had, and I look forward to the coming months as we will continue to refocus ourselves, rededicate our time to making sure—making sure that any bill we come up with that we come to the floor and ask one another to give a final vote on will be a bill that we have embraced from all different perspectives of finding the solutions we need.

This underlying bill is clearly not that bill, and many of us have grave concerns about where the priorities are in this bill and how we make those priorities more positive in all directions. I look forward to regaining our time and energy and being able to come back and talk about these issues and really solve all of the problems, all of the consequences that come with our ultimate passion of wanting to ensure that we do take a stand on climate change and that we do embrace our opportunity to make sure we do not make it irreversible in terms of what climate change is; that we will work hard to ensure that our children and our grandchildren will have an incredible planet to be able to live on, to work on, and again to reach their every potential and their every possibility.

RECESS

Mrs. LINCOLN. Mr. President, I ask unanimous consent that the Senate stand in recess until 11:30.

There being no objection, the Senate, at 10:22 a.m., recessed until 11:30 a.m., and reassembled when called to order by the ACTING PRESIDENT pro tempore.

Ms. MIKULSKI. I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WHITEHOUSE. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. DORGAN). Without objection, it is so ordered.

OFFICE OF LEGAL COUNSEL

Mr. WHITEHOUSE. Mr. President, I thank the Presiding Officer for coming to the chair a little early in order to allow me a chance to make a statement. It was a considerable courtesy and one that is much appreciated.

I will open my remarks by saying: Well, here we go again. I have come to the floor several times already to warn of what appears to be a loss of integrity and legal scholarship at the once proud Office of Legal Counsel at the Department of Justice.

First, back in December, I pointed out the, shall we say, ''eccentric'' theories that arose out of the OLC's analysis that greenlighted President Bush's program for warrantless wiretapping of Americans. Those opinions had been secret. These theories came to light after I plowed through a fat stack of classified opinions held in secret over at the White House and pressed to have the particular statements declassified.

My colleagues may recall that these theories included the following:

An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order whenever he wishes to depart from the terms of a previous executive order. Rather

than violate an executive order, the President has instead modified or waived it.

As the Presiding Officer well knows, Executive orders have the force of law. A theory like this allows the Federal Register, where the executive orders are assembled, to become a screen of falsehood behind which illegal programs can operate in violation of the very executive order that purports to control the executive branch. So that was a fine one.

Here is another:

The President, exercising his constitutional authority under Article II—

That is the section of the Constitution that provides for the Presidency and the executive branch of Government. Article I establishes the Congress; article II establishes the executive branch—

can determine whether an action is a lawful exercise of the President's authority under Article II.

I think the expression for that is ''pulling yourself up in the air by your own bootstraps,'' and it runs contrary to widely established constitutional principle. The seminal case of Marbury v. Madison, which every law student knows, says it is emphatically the province and the duty of the judiciary to say what the law is. And none other than the great Justice Jackson once observed:

Some arbiter is almost indispensable when power . . . is . . . balanced between different branches, as the legislature and the executive. . . . Each unit cannot be left to judge the limits of its own power.

Yet this was the opinion of the Office of Legal Counsel.

Here is the one I found perhaps most personally nauseating:

The Department of Justice is bound by the President's legal [opinions.].

A particularly handy little doctrine for the White House, when it is the legality of White House conduct that is at issue. Wouldn't it be nice if you could come into the courts of America or face the laws of America with a principle that the law-determining body has to follow your instruction? If criminals had that, no one would ever go to jail. It is inappropriate in our system of justice.

So I found these theories pretty appalling. I found them to be, frankly, fringe theories from the outer limits of legal ideology. They started me worrying about what is going on at the Office of Legal Counsel.

Then we came to the OLC opinions the Bush administration used to authorize waterboarding of detainees. Then, again, I came to the floor because I was flabbergasted, horrified to discover that to reach its conclusions, the Office of Legal Counsel totally overlooked two highly relevant legal determinations and then went and drew language out of health care reimbursement law—health care reimbursement law—in order to justify allowing the administration to torture and waterboard prisoners.

What were the highly relevant legal determinations the Office of Legal Counsel overlooked? Well, one was that it was American prosecutors and American judges who in military tribunals after World War II prosecuted Japanese soldiers for war crimes, for torture, on evidence of their waterboarding American prisoners of war. Missed it.

The other major thing the OLC overlooked was that the Department of Justice itself prosecuted a Texas sheriff as a criminal for waterboarding prisoners in 1984. The sheriff's conviction went up on appeal to the U.S. Court of Appeals for the Fifth Circuit, one row under the U.S. Supreme Court, and the appeals court, in a public opinion, described the technique as ''water torture.'' The opinion used the term ''torture'' over and over again. All a legal researcher has to do is type the words ''water torture'' into the legal search engines, Lexus or Westlaw, and this case comes up: United States v. Lee, 744 F2d 1124.

How did the wide-ranging legal analysis that ranged as far afield as health care reimbursement law for guidance miss a case that is bang on point, that was prosecuted by the Department of Justice itself, that is reported in a decision of the U.S. Court of Appeals, that describes this exact technique as ''water torture''? How, indeed.

After this, I began to refer to whatever it is that the Office of Legal Counsel has now become as George Bush's ''Little Shop of Legal Horrors.''

Now we have this. The FISA statute contains what is called an exclusivity provision. The FISA statute of the Foreign Intelligence Surveillance Act is the law that governs our surveillance authority on foreign intelligence matters. It is an active issue before this body right now, and the exclusivity provision is actively being discussed. Here is how it reads:

[FISA] shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.

''Exclusive means.'' It seems pretty clear. And exclusivity provisions such as this in statutes are not uncommon. More on that later.

But let's look at what the Office of Legal Counsel said about that language. This is language Senator FEINSTEIN and I have had declassified. Similar to the others, it was buried in a classified opinion:

Unless Congress made a clear statement in the Foreign Intelligence Surveillance Act that it sought to restrict presidential authority to conduct wireless searches in the national security area—which it has not—

''Which it has not''—

then the statute must be construed to avoid such a reading.

Well, this is particularly devilish because we have had a long argument through the FISA debate with the administration over the exclusivity provision. Senator FEINSTEIN has led the charge on this, with strong bipartisan support from Senators HAGEL and SNOWE, and never once, in all these discussions, have I heard the administration say: Oh, there is a problem with the exclusivity language in the FISA bill. There is a loophole in it. It is not as strong as it could be. There is something Congress did in the exclusivity clause that would open a way for the President to wiretap Americans without a warrant.

Never once been said. But behind the scenes, in secret opinions, they proclaimed that some loophole exists. I do not see the loophole: FISA ''shall be the exclusive means . . . .'' Where are you going to challenge it? Are you going to say: Well, maybe the hole is that they referenced the national security area? But the national security area is where our foreign intelligence surveillance exists. Well, maybe it has to do with wireless searches? No, wireless searches are precisely what the FISA act is all about. Maybe it has to do with Presidential authority? Well, who else wiretaps? We do not in Congress. The judges do not. Of course, it is the executive branch.

So maybe it is that they do not think it was a clear enough statement? Well, let's take a look at that and start with a case from the U.S. Supreme Court. The Supreme Court was discussing a statute that gave the Court ''exclusive'' jurisdiction. Chief Justice Rehnquist wrote for the Supreme Court that this was ''uncompromising language.''

He continued:

[T]he description of our jurisdiction as ''exclusive'' necessarily denies jurisdiction of such cases to any other federal court.

Chief Justice Rehnquist said:

This follows from the plain meaning of ''exclusive.''

The Chief Justice then cited to Webster's New International Dictionary for that plain meaning. My Webster's defines ''exclusive'' as ''single, sole,'' ''excluding others from participation.'' That sounds clear to me. The ''single'' means, the ''sole'' means, the means that excludes others from participation.

Lower courts have discussed the FISA statute's own exclusivity provision directly. Chief Justice Rehnquist was talking about a different exclusivity provision. The FISA exclusivity provision was the subject of a case called United States v. Andonian, cited 735 F. Supp. 1469. The court said this. Let me read three sentences talking about the exclusivity language in FISA.

[This language] reveals that Congress intended to sew up the perceived loopholes through which the President had been able to avoid the warrant requirement. The exclusivity clause makes it impossible for the President to ''opt-out'' of the legislative scheme by retreating to his ''inherent'' Executive sovereignty over foreign affairs . . . . The exclusivity clause . . . assures that the President cannot avoid Congress' limitations by resorting to ''inherent'' powers as had President Truman at the time of the ''Steel Seizure Case.''

By using this exclusivity clause, the court concluded:

Congress denied the President his inherent powers outright. Tethering Executive reign,

Congress deemed that the provisions for gathering intelligence in FISA and Title III were ''exclusive.''

Now, there still may be a constitutional question about whether the President's Article II powers exist, no matter whether Congress has passed a particular statute. But there can be no real question about the intention or the effect of FISA's exclusivity provision.

I have sat and stared at FISA's exclusivity provision and the OLC language side by side, and I cannot make sense of how they came to that conclusion. Congress says, plain as day, FISA is the exclusive means, and OLC says Congress did not say that.

So I wonder, maybe there is some strange legal use of the term ''exclusive'' that I missed in my 25 years of lawyering. Then I find this Court decision that says this very language in the FISA statute means Congress ''intended to sew up the perceived loopholes,'' that this language ''makes it impossible for the President to 'opt-out' '' of the FISA requirements; that it ''assures that the President cannot avoid Congress's limitations,'' and that by this language ''Congress denied the President his inherent powers outright.''

Then I thought, maybe that is just a district court decision. That is a lower court. But here is the Supreme Court of the United States looking at an exclusivity clause in another statute and calling it ''uncompromising language,'' taking that word ''exclusive'' at its plain dictionary meaning. There is literally no way I can see to reconcile OLC's statement with the clear, plain language of Congress.

I have, in the past, expressed the fear that the Office of Legal Counsel, under veils of secrecy, immune from either public scrutiny or peer review, became a hothouse of ideology, in which the professional standards expected of lawyers were thrown to the winds, all in order to produce the right answers for the bosses over at the White House.

Well, as I said at the beginning, here we go again. Oh, one more thing. When the Department of Justice sent me the letter acknowledging that there was nothing that needed to be classified about this phrase, they also said this phrase was now disclaimed—their opinion was now disclaimed; not just declassified but disclaimed—by the Department of Justice.

The letter reads:

[A]s you are aware from a review of the Department's relevant legal opinions concerning the NSA's warrantless surveillance activities, the 2001 statement addressing FISA does not reflect the current analysis of the Department.

But that does not answer this: What went wrong at the OLC? What led to this disclaimed opinion in the first place, and other opinions I have had to come to the floor about? Has it been put right? This is an important question because this is an important institution of our Government, and we need to be assured it is working for the American people, that it is of integrity and that it is back to the standards of legal scholarship that long characterized the once-proud reputation of that office.

We do not have that assurance. There is a continuing drumbeat of what appears to be incompetence, and we need the reassurance. We are entitled to the reassurance. Something has to be done.

Mr. President, I ask unanimous consent that the Department's letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 13, 2008.

Hon. DIANNE FEINSTEIN,
Hon. SHELDON WHITEHOUSE,
U.S. Senate,
Washington, DC.

DEAR SENATOR FEINSTEIN AND SENATOR WHITEHOUSE: This responds to your letter, dated April 29, 2008, which asked about a particular statement contained in a classified November 2001 opinion of the Department's Office of Legal Counsel addressing the Foreign Intelligence Surveillance Act. The statement in question asserted that unless Congress had made clear in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area, FISA must be construed to avoid such a reading. The statement also asserted the view in 2001 that Congress had not included such a clear statement in FISA. As you know, and as is set forth in the Department of Justice's January 2006 white paper concerning the legal basis for the Terrorist Surveillance Program, the Department's more recent analysis is different: Congress, through the Authorization for Use of Military Force of September 18, 2001, confirmed and supplemented the President's Article II authority to conduct warrantless surveillance to prevent catastrophic attacks on the United States, and such authority confirmed by the AUMF can and must be read consistently with FISA, which explicitly contemplates that Congress may authorize electronic surveillance by a statute other than FISA.

We understand you have been advised by the Director of National Intelligence that the statement in question, standing alone, may appropriately be treated as unclassified. We also would like to address separately the substance of the statement and provide the Department's views concerning public discussion of the statement.

The general proposition (of which the November 2001 statement is a particular example) that statutes will be interpreted whenever reasonably possible not to conflict with the President's constitutional authorities is unremarkable and fully consistent with the longstanding precedents of OLC, issued under Administrations of both parties. *See, e.g.*, Memorandum for Alan Kreczko, Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Applicability of 47 U.S.C. section 502 to Certain Broadcast Activities at 3 (Oct. 15, 1993) (''The President's authority in these areas is very broad indeed, in accordance with his paramount constitutional responsibilities for foreign relations and national security. Nothing in the text or context of [the statute] suggests that it was Congress's intent to circumscribe this authority. In the absence of a clear statement of such intent, we do not believe that a statutory provision of this generality should be interpreted so to restrict the President constitutional powers.''). The courts apply the same canon of statutory interpretation. See, e.g., Department of Navy v. Egan, 484 U.S. 518,530 (1988) (''[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'').

However, as you are aware from a review of the Department's relevant legal opinions concerning the NSA's warrantless surveillance activities, the 2001 statement addressing FISA does not reflect the current analysis of the Department. Rather, the Department's more recent analysis of the relation between FISA and the NSA's surveillance activities acknowledged by the President was summarized in the Department's January 19, 2006 white paper (published before those activities became the subject of FISA orders and before enactment of the Protect America Act of 2007). As that paper pointed out, ''In the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute [in the AUMF] had confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such surveillance to prevent further catastrophic attacks on the homeland.'' Legal Authorities Supporting the Activities of the National Security Agency Described by the President at 2 (Jan. 19, 2006). The Department's white paper further explained the particular relevance of the canon of constitutional avoidance to the NSA activities: ''Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes to overcome any restrictions in FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda.'' Id. at 3.

Accordingly, we respectfully request that if you wish to make use of the 2001 statement in public debate, you also point out that the Department's more recent analysis of the question is reflected in the passages quoted above from the 2006 white paper.

We hope that this information is helpful. If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,

BRIAN A. BENCZKOWSKI,
Principal Deputy Assistant Attorney General.

Mr. WHITEHOUSE. Mr. President, I thank the Presiding Officer again for his courtesy and yield the floor.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Jersey, Mr. LAUTENBERG.

Mr. LAUTENBERG. Mr. President, I thank you. I will not take long.

D-DAY AND THE GREATEST GENERATION

Mr. LAUTENBERG. Mr. President, today is a noteworthy anniversary. It is the anniversary of D-day, the day the largest invasion force in the history of man landed on the beaches of Normandy.

They came from across the world—133,000 brave soldiers, sailors, and airmen—from England, Canada, and the United States. On that particular day, more than 10,000 soldiers died, giving their lives so that their families, their